86-204

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SAM ZALMAN GDANSKI, ESQ.
Attorney for Petitioner
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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals in the Federal Circuit denying the appeal of the Appellant violates the due process provisions of the Constitution by virtue of its failure to recognized that current Commercial Law permits excusal from a contract where it is impracticable as the contract price because a failure to recognize said concept will have the effect of bankrupting the contractor and giving undue enrichment and unjustment to the Government.

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

No.

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ADVANCE BUILDING MAINTENANCE COMPANY, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit of April 30, 1986, of which rehearing was denied on May 8, 1986.

OPINIONS BELOW

The order of the United States Court of Appeals for the Federal Circuit

of March 12, 1986 is printed in Appendix A hereto, infra, page 16. The order denying rehearing is printed in Appendix A hereto, infra, page 18, dated May 8, 1986.

JURISDICTION

The judgment of the United States Court of Appeals For the Federal Circuit (Appendix A, infra, page 16) was entered on March 12, 1986. The petition for rehearing was denied on May 8, 1986 (Appendix A, infra, page 18). The jurisdiction of the Supreme Court is invoked under Title 28 of the USCA Sec. 1255.

QUESTIONS PRESENTED

Whether the decision by the Court of Appeals for the Federal Circuit denying the appeal of the Appellant violates the due process provisions of the Constitution by virtue of its failure to recognize that current Commercial Law permits excusal from a contract where it is impracticable at the contract price because a failure to recognize said concept will have the effect of bankrupting the contractor and giving undue enrichment and unjustment to the Government.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the fourth section of the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Wrongful and intentional acts are the basis of this action brought by Advance Building Maintenance Company. The decision of the Armed Services Board of Contract Appeals 27183 and 28219 were reviewed by the Court of Appeals for the Federal Circuit. The contract F03602-82-C-0003 was awarded by the Base Contracting Division at Little Rock Air Force Base, Arkansas. This was the first such mess services attendant contract that the Appellant ever obtained and, thereafter, ceased performance due to the fact that it was losing more than Twenty Thousand and 00/100 ($20,000.00) Dollars a month. The Appellant's contention was that its default was excused based on the theories of mistake in bid, commercial impracticability, overreaching and unconscionability. The Board awarded the Government Four Hundred Five Thousand Five

Hundred Seventy Four and 79/100 $475,574.79) Dollars in excess reprocurement costs.

THE FACTS

The Contracting Officer in originally evaluating the Appellant's bid believed that it was too low and suspected a mistake in bid. In fact, its own food services officer, who was the technical representative who prepared the Government's estimate felt that the Appellant's bid was too low. The Contracting Officer requested several verifications from the Appellant but never disclosed the Government's own dollar estimate of the job. This was particularly and specifically important because this is the first time a new format was to be utilized by the Government and any other information furnished the contractor would be meaningless.

The Appellant provided food services and it became apparent that it was in a position of continually losing

Twenty Five Thousand and 00/100 ($25,000.00) Dollars and was forced to cancel the job. The Government thereafter terminated the contract for default and reprocured the services from another contractor. The Government then attempted to assess the contractor but not only with the first year's difference in price, but also the excess reprocurement costs for the second and third year which is totally unconscionable. Since these are option years, it would have been obvious that the Government should have been prevented from awarding an option follow on contract where it was calculated to have the effect of putting a contractor out of business.

SUMMARY OF ARGUMENTS

Prior to bid award, the Government withheld material information from Appellant in the form of the Government's own dollar estimate of the cost.

According to Case Law as established by both the Board of Contract Appeals and the U.S. Court of Appeals, such cost estimates have been found to be so material that by not disclosing them under certain circumstances, the Government failed to take sufficient verification action and violated procurement regulations. The Board had concluded that the Government's estimate was immaterial. The Board is incorrect in its conclusion and failed to apply the appropriate Case Law which clearly supports the Appellant's contention that the Government acted improperly in its verification of bid procedure. Next, the Government's action in withholding its estimate and awarding Appellant a contract that it felt was a very low price, constituted overreaching and resulted in an unconscionable contract. Third, even if the Government had not

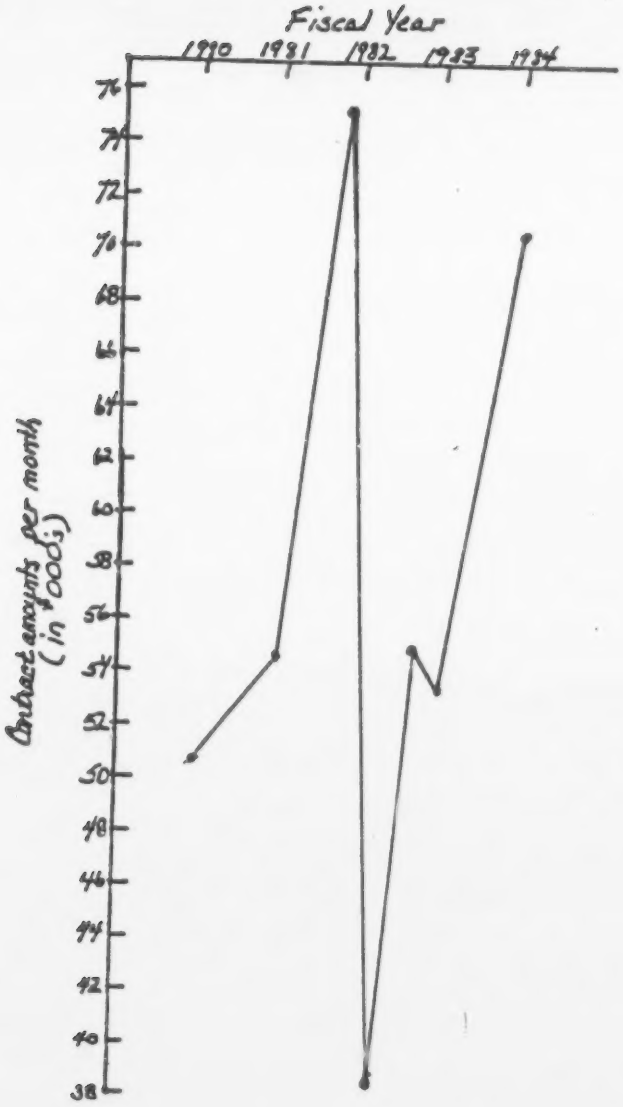
withheld the material information, the contract as awarded to the Appellant was unconscionable. The below graph as evidenced the Appellant's $38,921.00 bid is sufficiently and appreciably outside the mainstream of prior contractors or subsequent contractors. To hold a contractor to this dollar amount and assess the excess reprocurement costs will bankrupt him.

Contractor	Contract Amount Per Month
Chesapeake FY1980	$ 50,826.36
Chesapeake FY1981	54,955.62
Chesapeake Oct.-Dec. 1981	75,024.00
Advance Building Maintenance Company* FY1982	38,921.00
Moore's Cafeteria Remainder FY1982 (May-Sept.)	55,000.00
Moore's Cafeteria FY1983	53,833.33

Contractor	Contract Amount Per Month
Hamilton Enterprises FY 1984	$ 70,877.25

*First AFSCAG contract, additional work added.

The information supplied in this chart has been plotted graphically for illustration purpose as follows:


Fiscal Year
1980
1981
1982
1983
1984
Contract amounts per month
(in $000's)
76
74
72
70
68
66
64
62
60
58
56
54
52
50
48
46
44
42
40
38

REASONS FOR GRANTING WRIT

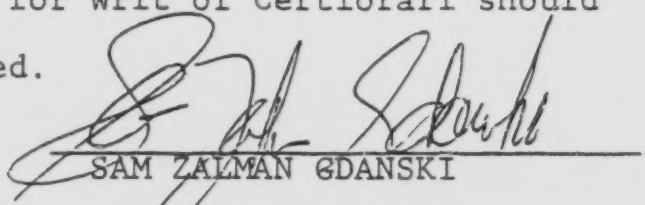
The right under the due process clause of the United States Constitution requires a fair hearing and not take away a contractor's property without just compensation. According to the Restatement (Second) of Contracts, Section 261 comment d (1979), the standard for commercial impracticability is satisfied where performance was impracticable at the contract price, "because (of the) extreme and unreasonable difficulty, expense . . . or loss to one of the parties involved." The Board recognized the validity of the accounting analysis performed by Arthur Andersen & Co. for Appellant. In its decision, the Board noted that the Appellant had established that its loss on the instant contract was $118,000.00. The Board also found that the Appellant incurred an overall business loss of $57,034.00 for fiscal

year 1982. Although the Board did not feel it necessary, Arthur Andersen & Co., the accountants, who rendered testimony, also analyzed the potential loss that Appellant would have incurred had it continued to perform until October 1, 1982, the first year only which would have been $191,251.00 resulting in an overall business loss for that year of $130,247.00. This does not even consider the imposition of punishment for the second and third year. To require and neglect to recognize the rules of modern day courts in recognizing commercial impracticability even by objective standards just because this is a Government contract, violates the contractor's constitutional safeguards. Recognized Case Law before the Court of Appeals for the Federal Circuit and Government Contract Law in the Clarke Case, ASBCA No. 24306, 82-1 BCA Par.15627

(Jan. 29, 1982) and the Hamilton Case, U.S. v. Hamilton Enterprises, Inc., 711 F2d 1038 (Ct. App. Fed. Cir. 1983) have recognized that where the Government fails to provide the contractor with the requisite specific important information which in this case was a dollar amount is unfair for the Government then to require the contractor to perform at his own bankruptcy.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.



SAM ZALMAN GDANSKI

Attorney For Appellant

APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ADVANCE BUILDING MAINTENANCE COMPANY, Appellant,	)	Appeal No. 85-2505
v.	)	
THE UNITED STATES, Appellee.	)	

DECIDED: March 12, 1986

Before MARKEY, Chief Judge, FRIEDMAN, Circuit Judge, and RE, Chief Judge, United States Court of International Trade.*/

PER CURIAM.

The decision of the Armed Services Board of Contract Appeals (Board) ASBCA Nos. 27183 and 28219, denying the appeals by the appellant from decisions of the contracting officer, is affirmed on the basis of the opinion of the Board, reported at 85-2 B.C.A. (CCH) Par. 18,706 (1985).

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*/ Sitting by designation pursuant to 28 U.S.C. Sec. 291(a).

United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439

Francis X. Gindhart

Clerk Date: May 8, 1986

Appeal No. 85-2505, Advance Building Maintenance Company v. U.S.

Dear Mr. Gdanski:

Your recently submitted paper cannot be filed for the following reason(s):

( ) Your entry of appearance was not filed. CAFC Rule 7

( ) You are not admitted to the bar of this Court. CAFC Rule 6

(X) This paper is out of time. FRAP 40

( ) Additional copies are needed. FRAP 27(d)

(X) Other The mandate issued in this appeal April 8, 1986; therefore, this Court no longer has jurisdiction in this case.

This paper is:

(X) Returned to you herewith.

( ) Retained pending correction of the noted

discrepancy.

If you have any questions or need assistance, please contact the Clerk's Office.

Very truly yours,

Francis X. Gindhart

By:

Elizabeth J. Carroll

Deputy Clerk

*Motion For Rehearing En Banc

SUPREME COURT OF THE UNITED STATES

No. A-927

ADVANCE BUILDING MAINTENANCE COMPANY,

Applicant,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9, 1986.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 3rd
day of June, 1986.

86-204

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. A-927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SAM ZALMAN GDANSKI, ESQ.
Attorney for Petitioner
39 Lawrence Place
Spring Valley, New York 10977
(914) 425-3300

SAPP

No. A-927

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ADVANCE BUILDING MAINTENANCE COMPANY,

v.

UNITED STATES OF AMERICA.

SUPPLEMENTAL APPENDIX

TO WRIT OF CERTIORARI

We include herein the decision of the Armed Services Board of Contract Appeals dated 23 April 1985 as a supplemental appendix to the Writ of Certiorari below:

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)
	)
Advance Building Maintenance	) ASBCA NOS.
	)
Company	) 27183 and
	)
Under Contract No. F03602-	) 28219
	)
82-C-0003	)

Appearances For The
Appellant: Sam Zalman Gdanski

39 Lawrence Place
Spring Valley, New York
10977

Appearances for the Government:

Colonel William P.
Rudland, USAF
Patrick D. Quinn, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE AXELMAN

These timely appeals under the Contract Disputes Act of 1978 (41 U.S.C. Sec. 601 et seq.) arise from a contract for the performance of mess attendant services at Little Rock Air Force Base, Arkansas.

In ASBCA No. 27183, appellant contests the propriety of the termination of the contract for default, contending that it had made a mistake in its bid for the contract; that contract performance was commercially impossible and impracticable; and that its default was excus-

able because of mutual mistake, over-reaching by the Government and unconscionability. It further seeks reformation and payment for services rendered under the doctrine of unjust enrichment.

In ASBCA No. 28219, appellant challenges the assessment of excess reprocurement costs against it on the ground of Government knowledge of its mistake in bid and Government failure to mitigate reprocurement costs.

Only entitlement is at issue in ASBCA No. 27183, but both entitlement and quantum are at issue in ASBCA No. 28219. For ease of reference, the Rule 4 file submitted for ASBCA No. 27183 will be referred to as R4I, and the file for ASBCA No. 28219 as R4II.

FINDINGS OF FACT

Pre-Award Activity

1. On 30 September 1981, the Base Contracting Division at Little Rock Air

Force Base, Arkansas (LRAFB), issued an invitation for bids (IFB) for Contract No. F03602-82-C-0003. The IFB solicited offers for the provision of mess attendant services at LRAFB from 1 January until 1 October 1982, and, at the options of the Government, for firscal years 1983 and 1984 (FY 83 and FY 84) if exercised at least 60 days prior to the end of the previous fiscal year (R4I, tab 9).

2. At the time the Government solicited and considered bids for the contract, mess attendant services at LRAFB were being provided for approximately $55,000 per month by Chesapeake Enterprises, Inc., under a contract awarded pursuant to the Section 8(a) set-aside program of the Small Business Administration (SBA) for disadvantaged or minority-owned small businesses. Chesapeake's contract was for FY80, and

at the options of the Government, for FY 81 and FY 82. Chesapeake performed the work in FY 80, and, upon exercise of the Government's option, in FY 81. The Government subsequently became dissatisfied with Chesapeake's performance, declined to exercise its option for FY 82, and sought to obtain mess attendant services from a different contractor (app. supp. R4, tabs A2, B2, C2, C4, D1; tr. 1/168, 220-23).

3. Chesapeake had used approximately 274 man-hours of labor per day (mh/d) in performing its SBA subcontract to provide mess attendant services at LRAFB. The contract before us contained additional tasks that had not been required of Chesapeake, but also allowed the contractor to allocate its workers more efficiently than could Chesapeake (R4I, tab 4; tr. 1/70).

4. The process for the procurement

of mess attendant services was initiated by the preparation of standard "Request for Purchase" form by the Government's food services officer. The food service officer estimated on that form that a new mess attendant services contract would cost approximately $60,000 per month. The estimate was derived by merely adding 10% to the cost of Chesapeake's contract. The contracting officer generally did not believe the estimates on such purchase forms to be reliable indications of the costs actually to be incurred by the Government upon award of a new contract, and did not disclose to prospective bidders on the contract the food service officer's estimate (app. supp. R4, tab B3; tr. 1/47, 51, 152, 161, 201, 218-19).

5. The Government received 14 responsive bids. Appellant submitted the low bid for the base period and also

for the option periods. Appellant's average monthly price for the remainder of FY 82 was $38,197.58. The average monthly prices of the second and third low bidders for the same period were $42,979.27 and $46,520.92 respectively. Appellant's average monthly price for FY 83 and FY 84 was $38,232.60. Those of the second and third low bidders were $43,238.34 and $46,152.76 respectively. Four contractors submitted bids whose average monthly prices for both the base and option periods were over $60,000 (Gov't supp. R4, tab 13).

6. The contracting officer believed that appellant's bid was too low and suspected a mistake in bid. In a telephone conversation on 23 November and in a letter of 30 November 1981, she notified appellant of the range of bids and requested that appellant review the statement of the work and its working

papers to verify its bid. The letter also contained procedures for appellant to follow in the event it determined that a mistake in bid had been made. By letters of 24 November and 4 December 1981, appellant verified its bid price (tr. 1/171-75; R4I, tabs 1-3).

7. Appellant's letters of 24 November and 4 December 1981 were not sufficient to assure the contracting officer that it could perform the contract work at its bid price. Consequently, by letter dated 9 December 1981, she notified appellant (R4I, tab 4):

> 1. We are in receipt of your verification of bid letters dated 24 Nov and 4 Dec respectively; however, because of the disparity between your bid and the historical data available to the Government on manhours used by the incumbent contractor,

we request that you carefully review the entire bid package.

2. The existing contract was negotiated and historical data (as taken from the incumbent's payrolls) indicates 99,912 man-hours were expended on an annual basis. In addition, the requirement for preparation of cold sandwiches for both dining halls; opening one weekend per month at Dining Hall 2; and operation of the modular unit for 8 1/2 hours per day, 5 days per week, was not in the previous contract.

3. We are aware that there can be a wide variance between manhours used by different contractors, based on the efficiencies of operation employed by each; however,

we would be remiss if we did not impart to you our concern that you may not have taken everything into consideration in computing your bid. You are also cautioned that you cannot pay less than the basic wage rate, plus full fringes, as contained in wage determination #81-1017 dated 6 Nov 81, which was incorporated by amendment 0004 to the IFB.

4. You will be required to perform all work in accordance with the terms and conditions of the contract, including the Statement of Work, regardless of the number of manhours used in computing your bid. The contract cannot be modified at a later date to authorize additional hours if, indeed,

you have made an error; therefore, it is imperative that you assure yourself beyond a reasonable doubt that you can perform at the price bid. It is for this reason, we request your reevaluation.

8. By letter of 14 December, appellant respondend (R4I, tab 5):

This is in reference to your letter dated 9, December, 1981. After careful evaluation of our bid we have taken all aspects of the contract into consideration. There is no error made in computing our price regarding wages and fringe benefits (sic) as contained in wage determination #81-1017 dated 6 November, 1981. We are aware of and it was figured into our bid preparation

of cold sandwiches for both dining halls; opening one weekend per month at Dining Hall 2; and operation of the modular until for 8-1/2 hours per day 5 days per week.

We are confident at this time that our service to Little Rock AFB will be satisfactory and we are looking forward to starting this contract on January 1, 1982, if awarded for that time.

9. The contracting officer was still concerned about appellant's bid after she received appellant's letter of 14 December. The Government again contracted appellant to ensure that it had reviewed the man-hour estimates underlying its bid. In response, by letter of 18 December 1981, appellant reiterated that it was "comfortable and

confident with the man hours" in its bid (R4I, tab 6; tr. 1/177).

10. While the bid verification efforts were proceeding, the Government investigated appellant's responsibility. It found that appellant was a responsible provider of janitorial services and was financially capable. Although it had never before undertaken a mess attendant services contract, it had hired as its General Manager of Food Services an experienced and highly regarded expert in the field. The Government concluded that appellant was a responsible bidder for the contract in spite of its inexperience because of the outstanding reputation for providing quality mess attendant services that appellant's newly-hired expert had developed while working for other companies in the past (Gov't supp. R4, tabs 16, 21-22; tr. 1/34, 37-39).

11. After satisfying herself that appellant was a responsible contractor and had not made a mistake in its bid, the contracting officer awarded the contract to appellant on 22 December 1981. Under the terms of the contract, appellant was to commence performance on 1 January 1982 (R4I, tab 9).

Contract Performance

12. Appellant's expert General Manager of Food Services spent only two days in Little Rock after performance commenced on 1 January 1982. Because of health problems, he terminated his employment with appellant that month (tr. 1/67, 181, 2/181-82). In January and part of February, appellant's performance of contract work was poor. It subsequently improved substantially, and was more than satisfactory by late March (Gov't supp. R4, tabs 30-32, 37-39, 41, 43, 45, 48, 53-54, 56-58; tr. 1/93,

184-85, 2/155-56).

13. On 12 February 1982, appellant's owner told an assistant to the contracting officer (who herself was also a contracting officer) that appellant was expending more man-hours of labor to perform the work than it had anticipated when it compiled its bid estimate. He told her also that appellant was losing a lot of money on the project and would like to get out of the contract. The parties also informally discussed the Government's prospective exercise of its options for FY 83 and FY 84. Appellant insists but the Government denies, that the contracting officer's assistant promised, in the course of their conversation, that the Government would not exercise its option to extend the contract to FY 83 (Gov't supp. R4, tab 48; tr. 2/153, 184, 3/48).

14. On 2 and 4 April 1982,

appellant's attorney orally and by mailgram requested a no-cost termination of the contract or an equitable adjustment, on the grounds that appellant allegedly had made a mistake in its bid for the contract and was losing nearly $25,000 per month. On 13 April and 14 April, he orally and by mailgram accused the Government of overreaching and unjust enrichment and notified the contracting officer that appellant would stop work on 18 April 1982 unless it was granted an increase in the contract price. On 15 April, appellant's owner reiterated to the contracting officer the threat of its attorney. The Government did not modify the contract in response. At 8:00 PM on 18 April 1982, appellant collected its equipment and left the job site (R4I, tabs 11-12, Gov't supp. R4, tabs 60, 62, 64, 68-69, 72, 83, 86).

15. In a final decision dated 16

April 1982, which was transmitted to appellant by telegraph on that date, the Government terminated the contract for default, effective 18 April 1982, on the ground that appelland had repudiated the contract (R4I, tabs 13, 14). If appellant had decided not to vacate the job site on 18 April 1982, the Government would have rescinded the default termination (tr. 1/109).

16. Appellant had used between 290 and 360 mh/d through 18 April 1982, as compared with its estimate when it bid for the contract of 210 mh/d (tr. 2/188, 190-92, 3/16).

17. Appellant is a partnership. On 1 January 1982, partners' capital in the partnership totaled $123,184. Between 1 January and 18 April 1982, the expenses attributable to the contract which appellant incurred exceeded the revenue it gained under the contract by $118,000.

Including its loss on the LRAFB contract, appellant lost $57,034 in 1982 on sales of $3,989,803 (exh. A-1).

Reprocurement of Mess Attendant Services

18. At 8:05 PM on 18 April 1982, the Government hired many of appellant's food service employees to ensure the continued performance of mess attendant services until another contractor could be hired. Many workers were foreign nationals who were not allowed to work for the Government for longer than 30 days (Gov't R4, supp. tabs 80, 82, 85; tr. 1/191-92, 2/9).

19. To avoid the problem of retaining foreign nationals as Government employees and to mitigate damages, the Government sought to reprocrue the mess attendant services as expeditiously as possible. It attempted to reprocure the services from Centro Management, Inc., and Tomb & Sons, which had originally

submitted the second and third low bids respectively on the contract. When contacted, however, they no longer offered to perform at their original bid prices. To save time, the Government then used competitive solicitations for the reprocurement, rather than sealed bidding procedures. For the same reasons it limited competition to the five firms which in 1981 had submitted the lowest responsive bids, aside from appellant's, in response to the original solicitation. The Government declined to pursue an unsolicited, unpriced offer of 14 April 1982 from Hamilton Enterprises, Inc. to replace appellant and start providing mess attendant services as of 18 April 1982, because Hamilton had not bid on the contract in 1981 (Gov't supp. R4, tabs 81, 84, 89, 91; app. supp. R4, tab A-7; tr. 1/190-93, 2/8-9, 16-17).

20. On 5 May 1982, the Government

contacted the five firms and requested their proposals to provide mess attendant services from 15 May 1982 until the end of FY 82 and, at the Government's options for FY 83 and FY 84. The Government provided to the firms the abstract of bids from the original solicitation, as well as its 1981 correspondence with appellant regarding bid verification. The statement of work for the reprocurement solicitation was virtually identical to the one in appellant's contract (R4I, tab 8; Gov't supp. R4, tabs 90, 93: R4II, tab 2; tr. 2/13-15).

21. Three firms submitted proposals in response to the reprocurement solicitation. Each contained an average monthly cost higher than that in the respective firm's original bid on the contract. Moore's Cafeteria Service, Inc. submitted the lowest priced proposal and on 21 May 1982 was awarded the contract. Moore's

agreed to perform the required mess attendant services for an average monthly price of $55,000 for the remainder of FY 82 and $53,833.33 for FY 83 and FY 84. Moore's commenced performance on 1 June 1982 and replaced the mess attendants hired by the Government from appellant's work force (Gov't supp. R4, tabs 95, 97; R4II, tab 1; tr. 2/69-70). Moore's expended an average of 209 mh/d to perform the mess attendant services at LRAFB (tr. 1/115, 133-34).

22. The Government exercised its option for Moore's to perform mess attendant services in FY 83. However, it was not satisfied with Moore's performance in FY 83 and as a result, did not exercise its option for Moore's to continue in FY 84. Instead, the Government contracted with the SBA, which subcontracted the mess attendant services for FY 84 to Hamilton Enterprises, Inc.,

under its 8(a) set-aside program. Hamilton agreed to provide the mess attendant services for an average monthly price of $70,877.25 (app. supp. R4, tabs E, CC, BBB, A-14).

23. In a final decision by the contracting officer on 2 March 1983, the Government assessed appellant for excess reprocurement costs totaling $454,434,82. The Government subsequently recalculated those costs and disclosed at the hearing of these appeals that the correct amount thereof was $28,978.92 for 18 April through 31 May 1982; $64,349.62 for the remainder of FY 82; $179,640.05 for FY 83; and $180,390.12 for FY 84, for a total of $454,358.71 (R4II, tab 9; exh. G-1, tr. 2/69-78).

24. Contracts negotiated through the SBA's 8(a) program are generally considered to be more costly than those that the Government obtains for the same

services through unrestricted competition. Recognizing that the amounts it paid Hamilton in FY 84 were substantially higher than would have been payable had it not reprocured the mess attendant services through the SBA's 8(a) program, the Government based its excess cost calculations for FY 84 on the option price in Moore's contract (exh. G-1; tr 1/209, 220-23, 2/75-76).

25. All of the excess costs which the Government assessed against appellant for FY 84, however, were not derived from payments which actually had been made by the Government to Hamilton at the time of the hearing of these appeals in July 1984. The evidence before us establishes that payments were actually made to Hamilton only through 15 June 1984 (ibid.). That part of the assessment for FY 84 beyond 15 June 1984 was based simply on projected figures for antici-

pated services by Hamilton. We conclude that the Government has proved, on the basis of actual payment made for FY 84 services, that it incurred excess costs as follows:

8.5 months @$15,600.73 (difference between monthly = $132,606.20 bid prices of Moore's and appellant for FY 84: $53,833.33 - $38,232.60

Consequently, the total excess costs incurred by the Government in this matter may be summarized as follows:

18 April to 1 June 1982	$ 28,978.92
1 June to 30 Sept 1982	64,349.62
1 Oct. 1982 to 30 Sept. 1983	179,640.05
1 Oct. 1983 to 15 June 1984	132,606.20
Total	$405,574.79

DECISION

ASBCA NO. 27183

Appellant urges that we convert the termination of its contract for default into a termination for the convenience of the Government because its bid was mistaken and never should have been accepted and also because the Government failed to reveal to it during the solicitation process an estimate of the projected cost of the work which the Government had in part based on prices paid to previous contractors. Among other contentions advanced by appellant are that it did not repudiate the contract and that its default was excusable under the doctrines of commercial impracticability, mutual mistake, overreaching by the Government, and unconscionability. Finally, appellant maintains that the Government should pay it the difference between the contract price and the reasonable value of the

services it performed between 1 January and 18 April 1982 on the ground of unjust enrichment.

The record in this appeal clearly indicates that appellant's mistake in bid if any, was an underestimation by it of the number of man-hours of labor necessary to perform the contract work.

It is well established that a unilateral mistake in judgment by a contractor in formulating its bid, as opposed to a clerical or arithmetical error or a misreading of the specifications, does not excuse a subsequent default. Ruggiero v. United States, 190 Ct. Cl. 327, 420 F.2d 709 (1970); Aerospace Components, Inc., ASBCA No. 28606, 84-3 BCA Par. 17,536.

Consequently, appellant's alleged bid error in the matter before us is not a valid basis for the setting aside of the default termination. Cf. Hamilton

Enterprises, Inc., 711 F.2d 1038, 1046 (CAFC 1983) (contractor denied reformation of contract despite mistake in bid arising from inaccurate estimate of necessary man-hours of labor to perform mess attendant services contract).

We likewise find no merit to appellant's contention that the termination for default should be overturned because the Government had not provided it an estimate of the cost of the work that the Government had prepared based on the costs of prior contracts. That estimate was simply a standard "Request for Purchase" form in which the Government's food service officer had perfunctorily added 10 per cent to the price of the existing contract. The only significant information involved in that estimate, from a bidder's standpoint, was the number of labor man-hours used by the previous contractor, and that information

was in fact furnished to appellant (finding 7).

We therefore conclude that the Government withheld from appellant no material information as to either the Government estimate or the prior contract for mess attendant services at LRAFB.

Appellant's claims of overreaching by the Government and of unconscionability are based upon its allegations that the Government wrongfully withheld from its essential information before accepting its bid. Since we have determined that the Government withheld no such information from appellant, we reject the claims of overreaching and unconscionability as baseless.

The doctrine of mutual mistake of fact, which appellant also invokes, is not applicable to this appeal. Appellant seeks to recover on the theory that the contract should be reformed because both

the Government and appellant mistakenly believed when they entered into the contract that appellant could perform the contract with the number of man-hours at that time estimated to be sufficient to perform the work.

Even where a mutual mistake of fact has been made, we cannot grant reformation if the contract put the risk of the mistake upon the party seeking reformation. National Presto Industries, Inc. v. United States, 167 Ct. Cl. 749, 764, 338 F.2d 99, 108 (1964), cert. den. 380 U.S. 962 (1965).

The contractor in a fixed-price contract assumes the risk of unexpected costs. As stated by the United States Supreme Court in United States v. Spearin, 248 U.S. 132, 136 (1918):

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not

> be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.

The unforeseen difficulty encountered by appellant arose from the unexpected retirement of its food service expert, without whom appellant was unable to perform its contract work at the man-hour rates on which it had based its bid. The risk that appellant's expert might terminate his employment with appellant was appellant's alone, for contractors assume the risk of hiring and retaining a competent work force. McNamara Const. of Manitoba, Ltd. v. United States, 206 Ct. Cl. 1, 509 F.2d 1166 (1975); Electro-Magnetics, Inc., ASBCA No. 19830, 75-2 BCA Par. 11,503. Consequently, even if there had been a mutual mistake as alleged, the risk of that mistake was assumed by appellant.

Appellant also relies upon the doctrine of commercial impracticability. Specifically, appellant contends that the contract was too expensive to carry out and that its nonperformance was excuable because many more mh/d were needed to perform than it had estimated when it bid on the contract. It further complains that its losses from contract performance were so heavy that it would have been commercially senseless to continue.

A contractor's nonperformance may be excusable for commercial impracticability where he can demonstrate that performance is substantially more difficult or expensive than foreseen by the parties and that he has not assumed the risk of that difficulty or expense. In such a case, a contractor is permitted to discontinue performance where further performance would be "commercially

senseless." A contractor may not be excused merely because he is losing money on the contract. However, the difficulty or expense of performance must be determined objectively; that is, a contractor may not rely solely upon his own inability to accomplish a task, but must also negate the possibility of performance by others; and the burden of proof to show commercial impracticability rests with the contractor. Koopers Company v. United States, 186 Ct. Cl. 142, 405 F.2d 554 (1968); Natus Corporation v. United States, 178 Ct. Cl. 1, 371 F.2d 450 (1960); Jalaprathan Cement Company, ASBCA No. 21248, 79-2 BCA Par. 13,927.

Appellant actually did expend many more mh/d in performing than it had projected when it bid on the contract. While it expected to use only 210 mh/d, it actually used between 290 and 360 mh/

d. Its underestimation, however, is in our view attributable to its lack of experience and know-how in providing mess attendant services. Recognizing that under the follow-up contract, Moore's used only 209 mh/d to provide the same services, we conclude that had appellant been more experienced and knowledgeable, the contract work could have been performed at the leve of expense that appellant had planned to incur when it bid on the contract. Consequently, performance at the contract price was, from an objective standpoint, neither commercially senseless nor impracticable or impossible. Appellant's claim of commercial impossiblity or impracticability is therefore without merit.

Nothwithstanding the allegation in appellant's complaint, appellant's threats in April 1982 to stop work on 18

April 1982 clearly and unequivocally manifested its intention not to perform under the contract, and constituted a repudiation of the contract. Big 3 Contracting Corporation, ASBCA No. 20929, 79-1 BCA Par. 13,601. Under such circumstances, summary termination for default was fully justified. Fairfield Scientific Corporation, ASBCA No. 21151, 78-1 BCA Par. 13,082, aff'd , 228 Ct. Cl. 264, 655 F.2d 1062 (1981).

Appellant has cited to us no authority supporting its affirmative claims against the Government for additional compensation on the ground of unjust enrichment for work it performed at LRAFB, and we find no factual or legal basis in the record before us to support those claims.

The appeal is denied in its entirety.

ASBCA No. 28219

Among appellant's defenses to the assessment of excess reprocurement costs against it by the Government is its contention that it is not liable for those costs because the Government should have realized it had made a mistake in bid and never awarded it the contract. Appellant further argues that even if the termination of the contract for default had been valid, the Government failed to mitigate damages and that the excess costs it assessed against appellant are therefore improper. Specifically appellant contends that the Government could have provided mess attendant services from 18 April to 31 May 1982 less expensively than it did when it hired appellant's employees to work directly for the Government. It further asserts that the excess costs incurred from 1 June to 1 October 1982 were excessive,

and that mess attendant service during that period could readily have been reprocured at a lower cost than was actually accomplished. Finally, appellant maintains that it is not liable for excess costs for the option years because Government contracting officials had represented to it that the Government would not exercise its options or assess reprocurement costs for the option years; because the Government had not intended to exercise those options prior to contract termination; and because the assessment against it of excess costs for that period was unconscionable.

As we have previously noted herein, a mistkae in bid based on a mistaken business judgment does not justify nonperformance of contract work. It can, however, under some circumstances be the basis for relief from liability for excess reprocurement costs if the Government knew or

should have known before award of the contract of the mistake in bid. Hamilton Enterprises, supra. Appellant correctly notes that a contracting officer may not award a contract without adequate verification by the bidder if there are clear indications of bid error and acceptance of that bid would be unfair to the bidder. Walter Straga, ASBCA No. 26134, 83-2 BCA Par. 16,611.

We have found that in the course of repeated bid verifications, appellant convinced the contracting officer that it had made no mistake in its bid (finding 11). Her acceptance of appellant's numerous assertions that it had made no mistake in its bid was reasonable for several reasons. First, appellant manifested its eagerness to perform at its bid price even after it was informed of the number of man-hours of labor expended by Chesapeake. Second, although

appellant's bid price was significantly lower than that which the Government was then paying Chesapeake, Chesapeake's contract was an 8(a) set-aside and therefore its bid price was expected to be high. Third, appellant's price was not signficiantly lower than the prices of the next low bidders. Finally, appellant's bid had been prepared by a distinguished expert in mess attendant services.

We conclude that even if appellant's bid was in fact mistaken, the contracting officer could not reasonably have known or even suspected that the bid was mistaken when she awarded appellant the contract.

Since we have concluded that the Government neither knew nor should have known of appellant's judgemental error prior to contract award, appellant is not entitled to relief from liability

for excess reprocurement costs on the basis of its alleged mistake in bid.

Concerning appellant's remaining challenges to the propriety of the excess reprocurement costs assessed against it, we look to the general principles set forth in Environmental Tectonics Corporation, ASBCA No. 21204, 78-1 BCA Par. 12,986 at 63,308:

> There are three essential elements in a Government claim for excess reprocurement costs:
>
> 1) That the Government repurchased supplies or services similar to those terminated (hereinafter "similarity");
>
> 2) That the Government actually incurred excess costs in a certain amount (hereinafter "incurrence"); and
>
> 3) That the Government acted reasonably to minimize the

> excess costs and the damage resulting from the default (hereinafter "reasonableness" or, alternatively, in the parlance of our decisions, "mitigation").

The element of "reasonableness" or "mitigation" subsumes various sub-elements, which might be characterized as follows: (a) the contracting officer acted within a reasonable time after the default; (b) a reasonable repurchase price was obtained; (c) the manner of repurchase was reasonable and was based upon reasonable efforts to mitigate the damages caused by the default.

Astro-Space Laboratories, Inc. v. United States, (18 CCF Par. 81,894); 200 Ct. Cl. 282, 470 F.2d 1003 (1972). See Solar

Laboratories, Inc., ASBCA No. 19957, 76-2 BCA Par. 12,115; FPR Par. 1-8.602-6 (substantially similar to ASPR 8-602.6)

Appellant does not question that the Government repurchased services similar to those terminated, or that the Government actually incurred the excess costs it assessed against appellant. It contends only that the Government's mitigation efforts were unreasonable. For reasons which follow, we disagree.

18 April to 31 May 1982

Appellant contends that the Government could have obtained mess attendant services from 18 April through 31 May 1982 for less money than it actually paid. Appellant asserts that several contractors contacted LRAFB during the last week of appellant's performance and offered their services. According to appellant, the second low bidder on the

original contract, Centro Management, Inc., expressed its willingness to accept a contract at the price it originally bid, and another contractor, Hamilton, told the Government that it could be on the job on 18 April 1982. In fact, reprocurement from the second and third low bidders on the original contract was attempted, but both refused to perform at their original bid prices. Hamilton, which had not bid on the original contract, did not disclose a price for its services or any information pertaining to its ability to perform the services required. Beyond appellant's mere assertions, there is no credible evidence that the Government could have obtained adequate mess attendant services during this period at a reasonable cost from any contractor.

As of 8:00 PM, on Sunday, 18 April 1982, the Government was faced with an

urgent and immediate need to ensure the continuation of mess attendant services to feed the airmen at LRAFB. We regard the action which it took in directly hiring appellant's employees to perform for 43 days the same jobs they had performed for appellant as, under the circumstances, not only reasonable, but also that most effective means available to fulfill that need at the lowest cost. See Service Master Industries, Inc., ASBCA Nos. 22634 and 24592, 81-2 BCA Par. 15,452, at 76,550; P & B Catering Services, Inc., ASBCA No. 20726, 77-2 BCA Par. 12,770 (1977).

1 June to 30 September 1982

Promptly after the termination of appellant's contract for default, the Government solicited proposals from the contractors who had in 1981 submitted the five lowest, responsive, albeit unsuccessful, bids on the contract. It

accepted the lowest priced proposal, which was Moore's, and awarded that contractor a contract under which it performed mess attendant services from 1 June to 30 September 1982.

Appellant contends that the Government acted improperly in soliciting proposals from only the second through sixth lowest bidders on the original contract, citing Dillon Total Maintenance Inc. v. United States, 218 Ct. Cl. 732 (1978), and also that the Government failed to mitigate damages because it accepted Moore's proposal without attempting to negotiate a lower price.

We find no merit to either of appellant's contentions. The Government is not obligated, in reprocuring services after default termination, to solicit every known source of supply or to contact all bidders in the original procurement. The test for determining the adequacy of a

reprocurement is rather one of reasonableness, and the principal criterion is that a sufficient number of potential contractors are solicited to assure competitive prices and thereby mitigate the excess cost liability of the defaulted contractor. Century Tool Company, Inc., GSBCA No. 4007, 78-1 BCA Par. 13,050; Marmac Industries, Inc., ASBCA No. 12158, 72-1 BCA Par. 9249.

In the matter before us, we are convinced that the contracting officer acted reasonably to mitigate damages. It obtained competition from a sufficient number of contractors to ensure that it was obtaining the lowest price for the reprocurement; and it was not obligated to pursue further efforts by way of negotiation to obtain an even lower price from a contractor which had ostensibly submitted its lowest price to win the competition. In all likelihood, such

efforts would merely have wasted critical time. De-Luxe Vans, Inc., ASBCA Nos. 23708 and 25080, 81-2 BCA Par. 15,421.

The Dillon case upon which appellant relies is clearly distinguishable from the present appeal. Unlike the present matter, Dillon involved a situation where the Government failed to solicit six bidders on the original contract, three of which had submitted bids lower than the reprocurement price ultimately turned out to be, on the arbitrary ground that they were located away from the area of contract performance.

1 October 1982 to 30 September 1984

The Government exercised its renewal option under Moore's contract for FY 83. Although it did not exercise its option to renew Moore's contract for FY 84 and paid Hamilton more than it would have been obligated to pay Moore's for that

year, the Government assessed appellant for excess costs based only upon the amount it paid Moore's in FY 83 and the amount it would have been obligated to pay Moore's in FY 84 had it exercised its renewal option.

According to the terms of the contract, the Government had no obligation to notify appellant that it intended to exercise its renewal option until 1 August 1982, 60 days before the end of FY 82. Therefore, appellant's argument that the absence of such notification prior to termination of the contract in April 1982 precluded the Government from assessing excess costs against it for the option years is without merit.

We need not determine whether, as appellant alleges, but the Government denies, the contracting officer's assistant promised it on 12 February 1982 that the Government would not

exercise its renewal option for FY 83, because she was not the contracting officer and therefore did not have the power to bind the Government. Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947).

We determined in ASBCA No. 27183, supra, that the prices agreed to in the contract were not so low as to void it for unconscionability. For the reasons stated therein, we hold that it was not unconscionable for the Government to assess excess costs against appellant for the option years despite the magnitude of the increase in the reprocurement price over the contract price. Appellant's contention that assessment of excess costs for FY 84 was unconscionable because of the high price paid to Hamilton is irrelevant, since the excess cost assessment for FY 84 was based not on the price paid to Hamilton, but only

on that amount for which the Government could have obtained mess attendant services from Moore's.

We conclude from the record before us that the Government acted reasonably and properly in reprocuring the mess attendant services after appellant's default, and we would deny this appeal in its entirety if the Government had actually paid all of the excess costs which it assessed against appellant. However, since only $405,574.79 had been shown to have been paid at the time of the hearing of this appeal (finding 24), we must sustain the appeal as to the amount assessed in excess of that figure. United Aero, Inc., ASBCA Nos. 26967, 26968, 83-1 BCA Par. 16,268.

Accordingly, this appeal is sustained to the extent that the assessment of excess reprocurement costs against appellant is reduced to $405,574.79.

In all other respects, the appeal is denied.

Our decision herein shall in no way preclude the Government from a further assessment of excess reprocurement costs against appellant for the period from 15 June to 30 September 1984 if such costs were incurred after the hearing of this appeal.

Dated 23 April 1985.

s/Joseph B. Axelman
Joseph B. Axelman
Administrative Judge
Member of the Armed Services

I concur

s/Daniel P. Arons
Daniel P. Arons
Administrative Judge, Acting Chairman, Armed Services Board of Contract Appeals

I concur

s/William J. Ruberry
William J. Ruberry
Administrative Judge, Acting Chairman, Armed Services Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of

the Armed Services Board of Contract Appeals in ASBCA Nos. 27183 and 28219, Appeals of Advanced Building Maintenance Company, rendered in conformance with the Board's Charter.

Dated:

s/George L. Hawkes
George L. Hawkes, Recorder
Armed Services Board of
Contract Appeals